

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1918

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

To be argued by
RAYMOND FITZGERALD

UNITED STATES OF AMERICA ex rel.
WILLIAM PIPER,

Appellant,

vs.

PAUL J. REGAN, Chairman, New York
State Board of Parole and HONORABLE
R.J. HENDERSON, Superintendent of
Auburn Correctional Facility,

Appellees.

BRIEF FOR APPELLANT

Raymond Fitzgerald
Attorney for Appellant
200 Park Avenue
New York, New York 10017
(212) 682-2247

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Appellees
Two World Trade Center
New York, New York 10047
(212) 488-7590

On Appeal from the United States District Court
for the Northern District of New York

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 74-1918
-----x

UNITED STATES OF AMERICA ex rel.
WILLIAM PIPER,

Appellant,

-against-

HONORABLE PAUL J. REGAN,
CHAIRMAN, NEW YORK STATE
BOARD OF PAROLE, et al.,

Appellees.
-----x

BRIEF OF APPELLANT

STATEMENT OF ISSUE

Whether due process requires a parole board
to provide a prisoner with a statement of reasons
for the denial of parole.

STATEMENT OF THE CASE

This is an appeal from the order of Judge Edmund Port of the United States District Court of the Northern District of New York dated April 5, 1974, denying and dismissing appellant's application for a writ of habeas corpus, on the grounds that appellant failed to exhaust state remedies and to state a claim upon which relief could be granted, and Judge Port's order dated April 24, 1974, denying appellant's motion for reargument. Appellant seeks a statement of reasons for the denial of parole by the New York State Parole Board.

Subsequent to the denial of parole, appellant, pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York, brought a proceeding in the Supreme Court of the State of New York to compel the Parole Board to notify appellant of the specific reasons for the denial of parole. Justice Arthur Ervin Blauvelt dismissed appellant's petition on the ground of lack of jurisdiction. (R. 11a)

By petition sworn to on March 26, 1974, appellant applied to the United States District

Court for the Northern District of New York for a writ of habeas corpus. Appellant served a copy of his application for a writ of habeas corpus on the office of the Attorney General of the State of New York in Auburn, New York. By order dated April 5, 1974, Judge Port denied appellant's application for a writ of habeas corpus for failure to exhaust state court remedies and to state a claim upon which relief could be granted. (R. 18a) On or about April 19, 1974, appellant moved for a reargument of his application and, in the alternative, for a certificate of probable cause and assignment of counsel in order to prosecute an appeal. By order dated April 24, 1974, Judge Port denied appellant's motion in all respects. (R. 26a)

By notice of appeal dated May 3, 1974, appellant appealed the orders of Judge Port. On July 3, 1974 this Court granted appellant's motion for assignment of counsel and for leave to proceed in forma pauperis. On July 25, 1974, appellees moved for an order vacating this Court's July 3, 1974 order and remanding this case to the United States District Court for the Northern District of New York. By order dated August 20, 1974, this Court denied appellees' motion.

FACTS

On or about February 17, 1971, appellant was sentenced to an indeterminate term of six years imprisonment. (R. 6a) In or about January 1972 the New York State Board of Parole set appellant's minimum term of imprisonment at two years and six months. (R. 6a-7a) On or about November 6, 1973, appellant appeared before the Parole Board. Appellant's record demonstrated that appellant was a model prisoner and strongly recommended him for parole. Prior to appellant's appearance before the Parole Board, Mr. Donald Bryette, Parole Officer at Auburn Correctional Facility, informed appellant that appellant's residence and employment had been approved, that five reasonable assurance job offers had been received, and that parole was dependent upon appellant's institutional record and psychiatric report. The psychiatric report favored releasing appellant on parole. (R. 8a) Appellant's activities and his institutional record of having caused no disciplinary problems also favored his release. Moreover, Messrs. James A. Smith, Jr., John Zenor and Julian Eule of the Auburn Prison Project staff submitted

reports recommending appellant as an excellent prospect for parole. (R. 9a)

The Parole Board denied appellant parole and ordered that he be held in prison for at least an additional twelve month. (R. 8a) The letter denying parole stated:

"I wish most certainly to assure you, however, that the action taken by the Board of Parole was definitely in your best interest, and in fact this was the sole determinant factor in holding you for an additional year. After an extensive perusal and review of your entire record the Board of Parole deliberated your case situation, and unanimously agreed that the additional months within the institutional program would assist you further with regard to the rehabilitative program, and indeed have a deciding effect upon your future."

The letter did not set forth any reasons why parole had been denied nor the facts relied on in reaching the decision. (R. 12a)

ARGUMENT

Subsequent to the decision of the district court in this case, the Second Circuit, on June 13, 1974, decided United States ex rel. Thomas Johnson v. Chairman of New York State Board of Parole, Slip Ops. 4127 (2nd Cir. 1974) The petitioner in Johnson, like appellant, was a prisoner at Auburn Correctional Facility who, in 1973, was denied parole without being given a statement of reasons for the decision. See, United States ex rel. Johnson v. Chairman, Slip Ops 4127 at 4128. The issue presented in Johnson is identical with the issue presented here, i.e. whether due process requires a parole board to provide a prisoner with a statement of reasons for the denial of parole. The decision in Johnson is dispositive of this appeal.

POINT I

THE DISTRICT COURT ERRED IN
DISMISSING THE PETITION ON
THE GROUND THAT APPELLANT
FAILED TO EXHAUST STATE REMEDIES

In Johnson petitioner brought an Article 78 proceeding in the Supreme Court of the State of New York to compel the Parole Board to inform him of the reasons for denying

him parole. The Supreme Court dismissed the proceeding on the ground that under section 212 of the Correction Law the Parole Board's decision was not subject to review. This was the same procedure followed by appellant with the same result. Johnson did not appeal the dismissal. United States ex rel. Johnson v. Chairman, Slip Ops. 4127 at 4128-4129. Appellant, also, did not appeal the state court decision dismissing his petition.

Thereafter, Johnson, like appellant, applied for a writ of habeas corpus from the district court. Since Johnson did not seek actual release but rather a statement of reasons for the denial of parole, the district court treated Johnson's petition as an application for injunctive relief pursuant to 42 U.S.C. §1983, which is not subject to an exhaustion of state remedies requirement. United States ex rel. Johnson v. Chairman, 363 F. Supp. 416 at 417 (E.D.N.Y. 1973), aff'd, Slip Ops. 4127 at 4129 (2nd Cir. 1974). In appellant's case, the district court dismissed the petition, in part, on the ground that appellant failed to exhaust state remedies. In this it erred. Appellant's case is in the same posture as Johnson's and appellant seeks the same relief

sought by Johnson. His petition, like Johnson's, should have been treated as a civil rights action not requiring exhaustion of state remedies.

POINT II

THE DISTRICT COURT ERRED IN
DISMISSING THE PETITION ON
THE GROUND THAT APPELLANT DID
NOT STATE A CLAIM UPON WHICH
RELIEF COULD BE GRANTED

Johnson requires that a statement of reasons be provided to a prisoner whose parole is denied.* Appellant seeks a statement of reasons why his parole was denied. In light of Johnson, the district court's conclusion that appellant did not state a claim upon which relief could be granted is clearly erroneous.

In appellant's case, subsequent to the denial of parole, the Parol Board informed appellant:

*On June 26, 1974, subsequent to the Second Circuit's decision in Johnson, the Supreme Court added support to Johnson by its decision in Wolff v. McDonnell 42 U.S.L.W. 5190 (1974). In Wolff the Court held that all prisoners have certain minimum due process rights. In particular, due process requires that a written statement of the evidence relied on and the reasons for the decision be furnished to a prisoner who is the subject of a disciplinary proceeding. Wolff, 42 U.S.L.W. 5190 at 5198.

"...that the additional months within the institutional program would assist you further with regard to the rehabilitative program and indeed have a deciding effect upon your future." (R. 12a)

As this Court in Johnson recognized, this does not constitute a statement of reasons. The statement of reasons required by Johnson must contain both the grounds for the decision and the essential facts upon which the board's decision is based. United States ex rel. Johnson v. Chairman, Slip Ops. 4127 at 4144-4145. The board's decision in appellant's case did not satisfy the minimum due process standards required by Johnson because the board did not state the facts, if any, upon which it based its conclusion that parole be denied.

CONCLUSION

WHEREFORE, FOR THE REASONS STATED ABOVE, APPELLANT RESPECTFULLY REQUESTS THAT THE JUDGMENT OF THE COURT BELOW BE REVERSED AND THAT THE PAROLE BOARD BE DIRECTED TO FURNISH APPELLANT WITH A STATEMENT OF REASONS FOR THE DENIAL OF PAROLE.

Respectfully submitted,

RAYMOND FITZGERALD

By Raymond Fitzgerald

Attorney for Appellant
William Piper
200 Park Avenue
New York, New York 10017
(212) 682-2247

Raymond Fitzgerald
of counsel

Handwritten mark

OFFICE OF THE ATTORNEY GENERAL
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AUG 23 1974

NEW YORK CITY OFFICE
James J. LeFevre
ATTORNEY GENERAL *BR*